IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11948 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SARPANCH - DHARI GRAM PANCHAYAT

Versus

JAYESHKUMAR MULSHANKER BHATT

Appearance:

MR PJ KANABAR for Petitioner No. 1-2

MS DISHA N NANAVATY for the Respondent.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 22/01/2003

ORAL JUDGEMENT

Rule. Learned advocate Ms. Disha Nanavati waives service of notice of Rule on behalf of the respondent. With the consent of the learned

advocates for both parties, this petition is taken up for final hearing today.

2. This petition has been filed for quashing and setting aside the judgment and order dated 19th September, 2002 passed the learned Assistant Judge, Amreli in Civil Misc. Appeal no. 60 of 2001 below application exh. 10 filed by the respondents and rejecting the appeal of the petitioners on the ground of delay.

3. In this case, the learned counsel for the petitioners submitted that the petitioners filed Civil Miscellaneous Appeal No. 60 of 2001 before the District Court, Amreli. It was found that there was a delay of three days and that the petitioners had not filed an application alongwith the memo of the appeal to condone that delay. The petitioners filed appeal on 27th August, 2001. On 5.4.2002, the application exh. 19 was filed for condoning the delay in filing the appeal on 5.4.2002. On that application, the court passed the order "fix for hearing". The final order has been passed on 19th September, 2002 allowing the application exh. 10 which was filed by the respondent for rejection of appeal and rejecting the appeal on the ground of delay. Therefore, the petitioners have filed the present petition.

4. The contention of the learned counsel for the petitioners is that under Rule 3-A of Order 41 of Civil Procedure Code, if an appeal is presented after expiry of the period of limitation, the appellant is required to accompany an application supported by affidavit setting forth on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. As per the provisions of Rule 3-A of Order 41 of Civil Procedure Code, if the appeal is barred by limitation, then it shall be accompanied by an application supported by affidavit setting therein the facts showing sufficient cause for not presenting the appeal within such period. The learned counsel for the petitioners submitted that this Court has interpreted the provisions of Rule 3-A of Order 41, of Civil Procedure Code. This Court, in the case of Naran Anappa Shethi vs. Jayantilal Chunilal Shah reported in 1986 GLH, 84 has held that the provisions of Rule 3-A of Order 41 cannot be said to be mandatory for the reasons mentioned in para-7 of the said decision and that decision is based on the decision of the Supreme Court. The relevant portion of para-7 of the said judgment reads as under:

"The provisions of Rule 3-A cannot be said to be mandatory for the following reasons:

(a) The provision contained in Order 41,Rule 3-A of the Code is in the realm of procedure. The procedural law as far as possible cannot sand should not be interpreted in such a way so as to take away the right of the parties. In this connection, the observations of the Supreme Court in the case of Sangram Singh vs. Election Tribunal, Kotah, reported in AIR 1955 SC, 425 may be referred to :

"Now a code of procedure must be regarded as such. It is "procedure", something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties: not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to "both" sides) lest the very means designed for the furtherance of justice be used to frustrate it."

Therefore, unless there is compulsion, the procedural law should be read so as to advance the cause of justice and should not be strictly construed so that the vested rights of the parties to get a matter adjudicated on merits are frustrated.

(b) The contention that having regard to the wordings of Rule 3-A of Order 41 of the Code, the provision has got to be construed as mandatory cannot be accepted. It is true that looking to the phraseology of the provisions of Order 41, Rule 3-A, one may be tempted to say that the provision is mandatory. This is because of the use of the phrase "it shall be accompanied by an application supported by affidavit." While adopting the literal construction of the provision, one has got to keep in mind the intention of the Legislature in enacting the provision. As stated above, the intention of the Legislature was to see that the practice of deferring the question of limitation and deciding the same together with the final hearing of the appeal was not proper and that was required to be

stopped. Therefore, the provision for an application for condonation of delay and for deciding the same before admitting the appeal has been made. There is no other virtue in insisting upon an appeal memo being accompanied by such an application supported by affidavit. As held by the Supreme Court in the case of State of M.P.vs. Azad, reported in AIR 1967 SC, 276, if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies meaning of words and even the structure of the sentence. In para 5 of the judgment, the Supreme Court has observed :

"It is well settled that the use of the words "shall" does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word "shall" occurs and the other circumstances".

(c) In the instant case, if strict adherence to the provisions of Rule 3-A is insisted upon, it is likely to result into immense hardship, inconvenience and in many cases, it will surely lead to miscarriage of justice. There are likely to be cases in which the appellant may be bonafide believing that his appeal was within time; or the court may, while considering the appeal at the final hearing stage, think that the appeal was filed beyond the period of limitation. At the stage of final hearing only, it may come to the notice of the court or it maybe pointed out by the other side that the appeal was in fact filed beyond the period of limitation. The court may also find that it was a case of bonafide mistake. In such cases, if strict adherence to the provisions of Order 41, Rule 3-A is insisted upon, the appeal will have to be dismissed as being time barred without considering the question of condonation of delay because there was no application accompanying the appeal memo praying for condonation of delay. Such an absurd result would neve be intended by the Legislature. As a matter of fact, the Legislature neve wanted to cover such type of cases. The only intention of the Legislature was to see that the question of limitation should be decided initially before admitting the appeal. For achieving this object it is not necessary that there must be a written application praying for condonation of delay and that such application should be accompanied with

the appeal memo.

(d)Despite the use of the word "shall", the provision made is only directory. The surest test for determination as to whether the provision is mandatory or directory is to see as to whether the sanction is provided therein. If one looks at the provisions of Order 41, Rule 3-A, it is clear that there is no such sanction provided in the rule itself. In this view of the matter, the provision has got to be constructed as directory.

(e)At this stage, reference may be made to a Division Bench judgment of the Patna High Court in the case of State of Bihar and others vs. Raj, AIR 1983 Patna, 189. In that case also the provisions of Order 41, Rule 3-A came up for interpretation and the view taken by the Patna High Court is that the provision is directory and not mandatory.

(f) In both the decisions relied upon by the counsel for the respondent-landlord, the provisions of Order 41, Rule 3-A have been held to be mandatory. No reasons have been assigned why the provision is held to be mandatory. Probably the learned Judges of the High Court of Kerala who decided the aforesaid cases were persuaded to hold the provision mandatory on account of the language of the provision. With utmost respect, it is not possible to agree with the view taken by the Kerala and Karnataka High Court. The view taken in these two decisions is literal one and it would frustrate the ends of justice.

(g) The following passage from Crawford on Statutory Construction(Ed.1940, Article 261, p.216) may be seen.

" The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and consequences which would follow from construing

it the one way or the other."

The aforesaid passage has been approvingly quoted by the Supreme Court in the case of Govindlal Chhaganlal Patel vs. Agricultural Produce Market Committee, Godhra, reported in AIR 1976 SC, 263. Applying this well recognised cannot of construction of statutes, the conclusion is inescapable that the word "shall" used in the provision is directory and not mandatory and therefore, it must be read as "may".

5. On the basis of the interpretation made by this Court in the above case, the learned counsel for the petitioners vehemently argued that the appeal could not have been rejected as barred by limitation as the petitioners have already filed an application exh.19 on 5.4.2002 for condonation of delay in filing the appeal and it is not mandatory in nature, but it is directory as held by this Court that the application for condonation of delay must be accompanied with the memo of appeal at the time of filing the appeal. The lower appellate court has also observed that there is a delay of 3 days. The appellants have not given the application to condone the delay alongwith the appeal memo. In view of the provisions of Order 41, Rule 3-A of Civil Procedure Code, the application for condonation of delay shall be accompanied with the appeal memo if the appeal is presented beyond time. There is no occasion for the Court to say that the application for condonation of delay might be entertained later and there is no occasion for the appellants to request that such application should be received during the pendency of the appeal. Of course, it is necessary to file a separate application for condonation of delay, but the appellant can pray to condone the delay in the appeal memo. But in the present case, the appellants have not sought any delay to be condoned in the appeal memo. Hence, there is no question to condone the delay and hold that the appeal filed by the appellant is time barred and the application filed by the respondent at exh. 10 has been allowed.

6. On the contrary, the learned counsel for the respondent contended that under the statutory provisions of Order 41, Rule 3-A of Civil Procedure Code, the petitioners are required to file an appeal with an application to condone the delay if the appeal is not filed within time. In the present case, the appeal was not filed within time and there is no prayer in the memo of appeal to condone the delay. As such, no application

for condoning the delay is entertainable and the argument of the learned counsel for the petitioners cannot be entertained as the contention of the learned counsel for the petitioners is against the statutory provisions of law.

7. I have carefully considered the rival contentions raised by the learned counsel for the parties. From the facts and circumstances, it appears that the appeal was filed by the petitioner on 27th August, 2001 wherein there was no prayer to condone the delay and it appears that the learned counsel for the petitioners might be under an impression that the appeal was within time and that is why no prayer for condonation of delay has been made. No doubt, the application exh. 19 for condonation of delay was filed on 5.4.2002 after a period of about seven months, but by that time, the appeal was not rejected, but after filing of the application exh.19 for condonation of delay, the order was passed on 19.9.2002 about five months after the application exh. 19 was filed. The provisions of Order 41, Rule 3-A of Civil Procedure Code are not mandatory and only directory in nature and the petitioners would be covered under these provisions and the Court below is required to pass appropriate orders on the application exh. 19 for condonation of delay. The learned counsel for the petitioners submitted that the appeal was filed before the lower appellate court after two holidays and that is barred only by three days. The delay in filing the appeal can be condoned by this Court. But in the present case, it appears that the lower court has not at all considered and decided the application exh. 19 for condonation of delay filed by the petitioner on 5.4.2002 and so it is not proper for this Court to condone the delay without allowing that application which has not been considered at all by the lower appellate court. Though there are some authorities of the Supreme Court wherein it is held that if the delay is due to processing before the authority and that has not been considered and so that type of delay has been condoned. In the present case, no order has been passed on the application exh. 19 for condonation of delay filed by the petitioners and so this Court does not think it proper to pass appropriate orders on that application.

8. Accordingly, the order dated 19th September, 2002 passed by the Assistant Judge, Amreli in Civil Miscellaneous Appeal No. 60 of 2001 2002 is hereby quashed and set aside. The matter is remanded to the lower court court. The lower court is directed to consider and decide the application exh. 19 of the

petitioner for condonation of delay in filing the appeal and decide the same within a period of two weeks from the date of presentation of the certified copy of this order after giving an opportunity of hearing to both the parties. Rule made absolute accordingly with no order as to costs. Direct service permitted.

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